U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 01 July 2005

CASE NO.: 2002-BLA-05339

In the Matter of

MICHAEL LOUIS BELLITTS
Claimant

v.

JEDDO HIGHLAND COAL COMPANY
Employer

and

LACKAWANNA CASUALTY COMPANY
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Helen M. Koschoff, Esquire
For Claimant

Maureen E. Herron, Esquire
For Employer

Before: JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER
(UPON REMAND BY THE BENEFITS REVIEW BOARD)

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* (the "Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations.[1]

On October 22, 2003, I issued a Decision and Order (D & O) in which I denied Claimant's claim for benefits under the Act. In my decision, I found that Claimant had established the existence of pneumoconiosis, however, I also found that Claimant did not establish that he suffers from a totally disabling respiratory impairment. Therefore, I ruled that benefits under the Act were denied. D & O 16.

Claimant appealed and Employer cross-appealed to the Benefits Review Board ("the Board" or "the BRB"). In addition, the Director filed a motion to vacate the decision denying benefits and seeking remand of the claim. The Board issued a Decision and Order, (BRB No. 04-0181) (Board D & O), on November 30, 2004, in which it remanded my denial of benefits for reconsideration.

Specifically, the Board determined that I improperly discounted the weight to be given to some of the x-ray readings based on the readers' notations that the film was of a lower quality. In my original D & O, I noted that the "physicians who found the x-rays to be of the highest quality also interpreted the films as positive. For these reasons,…I find the x-ray evidence supports a positive finding of pneumoconiosis." D & O 7. The Board stated that I "did not supply a proper reason for the weight [I] accorded to the conflicting x-ray readings." Board D & O at 7. Additionally, the Board determined that I mischaracterized the qualifications of Dr. Gaia's qualifications when I considered his reading of Claimant's October 17, 2001 x-ray as positive for pneumoconiosis. Id. The Board also determined that my finding that Dr. Navani read Claimant's October 17, 2001 x-ray as negative for pneumoconiosis was in error. The Board agreed with the assertion of Claimant and the Director that Dr. Navani merely rated the x-ray's quality and did not express an opinion on the presence or absence of pneumoconiosis. As a result, the Board vacated my findings based on § 718.202 (a)(1).

Further, the Board determined that my findings pursuant to § 718.202(a)(4) were based in part on my findings pursuant to § 718.202(a)(1). As a result, the Board vacated my finding pursuant to § 718.202(a)(4) and instructed that on remand I consider the x-ray evidence and medical opinion evidence to determine if Claimant established the existence of pneumoconiosis. Specifically, the Board instructed that I reconsider the medical opinions of Drs. Kraynak and Dittman.

Additionally, the Board instructed that on remand I consider whether the pulmonary function tests conducted on October 23, 2001 and March 19, 2002 were in substantial compliance with the quality standards set out in § 718.103 (b). Based on my consideration of the pulmonary function tests, the Board instructed that I also consider my findings based on §

[1] The adjudication of this claim is subject to regulations as amended effective January 19, 2001. 20 C.F.R. § 718.2 (2001). Unless otherwise indicated, citations are to the regulations as amended.

718.204 (b)(2)(iv). Specifically, the Board instructed that I reconsider the opinions of Dr. Kraynak and Dr. Dittman in light of my review of whether the October 23, 2001 and March 19, 2002 pulmonary function studies were in substantial compliance with the quality standards found at § 718.103 (b).

FINDINGS OF FACT AND CONSLUSIONS OF LAW

A. Reconsideration of the x-ray evidence

Based on the Board's remand, I must first make a determination of the presence of pneumoconiosis pursuant to § 718.202 (a)(1). Pursuant to § 718.202 (a)(1), the existence of pneumoconiosis can be established by chest x-rays conducted and classified in accordance with § 718.102. The record contains the x-ray interpretations summarized in the following table.[2]

Date of X-ray	Date Read	EX. NO.	Physician	Radiological Credentials	I.L.O. Classification
10/17/01	10/18/01	DX-12	Gaia	BCR	1/1; p/p 4 zones
10/17/01	11/27/01	DX-13	Navani	BCR, B	Read for quality only
10/17/01	8/19/02	CX-1	Ahmed	BCR, B	1/1; s/p; 6 zones
10/17/01	8/22/02	CX-3	Cappiello	BCR, B	1/1; p/s; 6 zones
10/17/01	11/11/02	EX-7	Soble	BCR, B	0/0; emphysema
10/17/01	11/14/02	EX-8	Duncan	BCR, B	Negative
1/14/02	8/2/02	CX-18	Cappiello	BCR, B	1/2; p/s; 6 zones
1/14/02	12/5/02	EX-12	Soble	BCR, B	0/0
3/19/02	9/6/02	EX-3	Soble	BCR, B	0/1; s/t; no definite evidence of pneumo.
3/19/02	9/7/02	EX-5	Duncan	BCR, B	0/0
3/19/02	10/30/02	CX-21	Miller	BCR, B	1/1; t/s; 6 zones
3/19/02	11/06/02	CX-23	Cappiello	BCR, B	2/1; p/s; 6 zones

It is well established that the interpretation of an x-ray by a B-reader may be given additional weight by the fact finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983); Sharpless v. Califano, 585 F.2d 64, 66-67 (4th Cir. 1978). The Board has also held that the interpretation of an X-ray by a physician who is a B-reader as well as a Board certified radiologist may be given more weight than that of a physician who is only a B reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). In addition, the judge is not required to accord greater weight to the most recent x-ray evidence of record, but rather, the length of time between the x-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director,

[2] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51. A physician who is a Board Certified Radiologist ("BCR") has received certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206 (b)(2)(iii).

OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

There are a total of twelve readings of three separate x-rays. The first x-ray, dated October 17, 2001 was read as positive for pneumoconiosis by Dr. Juan Gaia. A review of the report completed by Dr. Gaia after his review of Claimant's x-ray reveals that Dr. Gaia is a Board Certified radiologist, however, he is not a B-reader as he was classified in my original D & O. Dr. Afzal U. Ahmed and Dr. Enrico Cappiello, who are both Board Certified Radiologists and B Readers, also read the October 17, 2001 x-ray as positive for pneumoconiosis. Dr. Marc G. Soble and Dr. C. Ronald Duncan, who are both Board Certified Radiologists and B readers, interpreted the x-ray as negative for pneumoconiosis. Dr. Shiv Navani also reviewed the October 17, 2001 x-ray. In my original D & O, I found that Dr. Navani read the x-ray as negative for pneumoconiosis. However, after reviewing Dr. Navani's report again, I find that the doctor read the x-ray for quality purposes only and did not express an opinion regarding whether the x-ray was negative or positive for pneumoconiosis. DX. 13. As a result, there are three positive readings and two negative readings of the October 17, 2001 x-ray.

Initially, I note that I am not required to make a determination of the presence or absence of pneumoconiosis based on the numerical superiority of positive readings compared to negative readings. Wilt v. Wolverine Mining Co., 14 B.L.R. 1-70, 1-76 (1990). Rather, I will refer to the qualifications of the interpreting physicians in making my finding regarding this x-ray. Four of the physicians who interpreted this x-ray for the presence of pneumoconiosis are Board certified radiologists and B readers. Therefore, I find that the interpretations rendered by the four dually qualified physicians (two positive for pneumoconiosis and two negative) are entitled to greater weight than Dr. Gaia's interpretation. As a result, I find the evidence regarding this x-ray is in equipoise.

The second x-ray, dated January 14, 2002 was found positive by Dr. Cappiello, but negative by Dr. Soble. Both physicians are Board certified radiologists and B readers. Because these physicians have essentially identical credentials, I find the evidence regarding this x-ray is in equipoise.

The third x-ray, dated March 19, 2002 was found positive for pneumoconiosis by Dr. Miller and Dr. Cappiello, both of whom are Board certified radiologists and B readers. Dr. Duncan, also a Board certified radiologist and a B reader, interpreted this x-ray as negative for pneumoconiosis. Dr. Soble reported that there was "[n]o definite evidence of pneumoconiosis." Dr. Soble indicated the profusion to be 0/1. A chest x-ray classified under the category 0 does not constitute evidence of pneumoconiosis. § 718.102 (b). Because these physicians have essentially identical credentials, I find the evidence regarding this x-ray is in equipoise.

In summary, I find the x-ray evidence to be in equipoise. As a result, I find that Claimant has not met his burden in establishing the existence of pneumoconiosis through x-ray evidence. Claimant has the burden of proof of establishing entitlement and as a result, Claimant also bears the risk of non-persuasion. Oggero v. Director, OWCP, 7 B.L.R. 1-860, 1-865 (1985).

B. Reconsideration of the medical opinion evidence for the presence of pneumoconiosis

The Board also vacated my decision regarding the finding of pneumoconiosis based on § 718.202(a)(4). Specifically, the Board instructed that I reconsider the medical opinions of Dr. Kraynak and Dr. Dittman and weigh those opinions with the newly reconsidered x-ray evidence to determine if Claimant established the existence of pneumoconiosis.

Dr. Raymond Kraynak began treating Claimant on May 22, 2002 and submitted a report dated July 25, 2002, in which he opined that Claimant was totally disabled due to coal workers' pneumoconiosis. CX. 10. Dr. Kraynak based his opinion on his examination of Claimant, Claimant's complaints, diagnostic studies and Claimant's history of coal mine employment. CX. 10; *See also* CX 24 at 14. Dr. Kraynak testified that Claimant complained of shortness of breath, a productive cough and difficulty walking a block or up a flight of steps without becoming short of breath. CX 24 at 7. Dr. Kraynak testified that Claimant smoked for a few months as a teenager and that he smoked about one pack of cigarettes per week from the age of 21 to 54. CX. 24 at 8. In Dr. Kraynak's opinion, Claimant's smoking history had no significance regarding his breathing problems. CX 24 at 17-18.

As part of his treatment of Claimant, Dr. Kraynak reviewed pulmonary function tests dated 5/22/02 and 9/17/02, which he administered, and the results of pulmonary function tests administered on 10/15/02, 10/23/01 and March 19, 2002. CX. 24 at 9. Regarding the 10/23/01 test, Dr. Kraynak stated the machine was not properly calibrated according to the regulations. Also, Dr. Kraynak stated the tracings did not conform to the quality standards as they were erratic and showed frequent breaks throughout. EX 24 at 10. Dr. Kraynak opined that a pulmonary function test performed on March 19, 2002 was also invalid and without evidentiary value. CX 24 at 11-12. He stated that the test was calibrated 8 days after it was performed and that the tracings appeared very erratic. CX 24 at 12-13.

Dr. Kraynak reviewed Claimant's x-ray dated 10/17/01, which was interpreted by several doctors as positive for pneumoconiosis. CX 24 at 10-11. In addition, Dr. Kraynak reviewed Claimant's x-rays dated January 14, 2002 and March 19, 2002. Dr. Kraynak opined that Claimant suffers from chronic obstructive pulmonary disease and hypoxemia due to coal workers' pneumoconiosis and that Claimant is totally disabled due to coal workers' pneumoconiosis.

Dr. Thomas Dittman examined Claimant on March 19, 2002. EX 1. Claimant complained of breathing problems and shortness of breath. Id. Claimant reported that he had dyspnea when walking one block or climbing one flight of stairs. Id. Dr. Dittman reported that Claimant never smoked.[3] Id. In his report, Dr. Dittman stated that a chest x-ray performed at Hazelton Radiology Associates and interpreted by Dr. Joseph G. Ciotola did not show pleural or paranchymal changes of pneumoconiosis. Id. Dr. Dittman testified that he did not personally

[3] Dr. Dittman previously examined Claimant on September 10, 1991 and issued a report dated November 27, 1991 in connection with an earlier claim for benefits. In his report, which is included as part of DX 1, Dr. Dittman reported that Claimant began smoking at the age of 21 and smoked until age 54. Dr. Dittman further stated that during this time period, Claimant smoked one pack of cigarettes per week.

view Claimant's x-ray. EX 11 at 23. Dr. Dittman reported that pulmonary function tests performed at Hazleton St. Joseph's Medical Center revealed evidence of a mild obstructive defect and noted improvement after bronchodilators. EX. 1. During a physical examination, Dr. Dittman noted "an increased resonant note as well as decreased breath sounds on auscultation." He noted the findings are consistent with obstructive lung disease. Additionally, the doctor noted evidence of hyperaeration, which he stated suggested chronic obstructive pulmonary disease. Id. Dr. Dittman opined that Claimant was not suffering from coal workers' pneumoconiosis and stated that Claimant was not disabled as a result of pneumoconiosis. Id.

Dr. Dittman testified at his deposition that he is board certified in internal medicine. EX. 11 at 5. He is not board certified in pulmonary medicine, nor is he an A or B reader of x-ray films. EX. 11 at 6. Dr. Dittman testified that Claimant reported that he worked in the coal industry for approximately 20 years. EX. 11 at 10. Dr. Dittman stated that Claimant's lungs were normal to inspection and noted that they sounded more hollow than normal sound. EX. 11 at 12. Claimant also had diminished breath sounds over both lung fields but the doctor observed no wheezes, rhonci, rales or rubs. Id.

Dr. Dittman testified that a pulmonary function study was performed in conjunction with his evaluation, which showed mild improvement after bronchodilators and produced results that were consistent with a mild obstructive abnormality. EX. 11 at 14-15. The doctor explained that post bronchodilator improvement suggests reversible bronchospasm, which he stated was not a characteristic finding of pneumoconiosis. EX. 11 at 17. The doctor testified that the results of the pulmonary function study would be characterized as non-disabling according to the Part 718 regulations. EX. 11 at 15-16. Dr. Dittman stated a blood gas study was also performed. An analysis of Claimant's blood revealed that the oxygenation was normal. EX. 11 at 18. Dr. Dittman stated that a normal blood gas study "would be information against having any disabling form of lung disease." Id.

Dr. Dittman opined that Claimant does not suffer from, nor is he disabled by, coal workers' pneumoconiosis. EX. 11 at 19-20. The doctor also opined that Claimant presents evidence of obstructive lung disease, which he stated was not related to Claimant's coal mine employment. EX. 11 at 20. Dr. Dittman testified that Claimant's obstructive lung disease arose without a known cause.[4] EX. 11 at 27.

A medical opinion is well documented if it provides the clinical findings, observations, facts and other data the physician relied on to make a diagnosis. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). An opinion that is based on a physical examination, symptoms and a patient's work and social histories may be found to be adequately documented. Hoffman v. B&G Construction Co., 8 B.L.R. 1-65 (1985). A medical opinion is reasoned if the underlying documentation and data are adequate to support the findings of the physician. Fields, *supra.* A medical opinion that is unreasoned or undocumented may be given little or no weight. Clark v. Karst-Robbins Coal Company, 12 B.L.R. 1-149 (1989).

[4] In his report dated November 27, 1991, Dr. Dittman opined that Claimant may have "some element of obstructive lung disease." Further, the doctor stated the obstructive lung disease "would almost certainly be on the basis of cigarette smoking." DX 1.

Based on my reconsideration of the medical evidence, I am unable to conclude that Dr. Kraynak's opinion on the issue of whether Claimant has pneumoconiosis is entitled to great weight. Although I find that Dr. Kraynak completed a thorough review of the evidence, his reliance upon x-rays that are not dispositive for the presence of the disease compromises his opinion. Dr. Kraynak's opinion is not well-documented or well-reasoned.

I also find that Dr. Dittman's opinion is not well-reasoned or well-documented. Dr. Dittman did not undertake a thorough review of the medical evidence of record. Moreover, Dr. Dittman's report is inconsistent with earlier assessments that he made, particularly with respect to Claimant's smoking history. In his 1991 report, Dr. Dittman considered a 33 year smoking history as the cause of Claimant's obstructive lung disease (DX 1), but in his 2002 report, Dr. Dittman simply stated that Claimant has evidence of obstructive lung disease, without identifying the etiology of the disease. Additionally, Dr. Dittman considered only 20 years of coal mine employment, whereas I credited Claimant with nearly ten more years of coal mine employment. Further, the report submitted by Dr. Dittman on April 9, 2002 did not contain any information regarding Claimant's employment history. A physician's report is required to contain a miner's employment history. § 717.104(a)(1). Although Dr. Dittman cured this oversight at his deposition, I find his initial assessment flawed by omissions. Despite Dr. Dittman's superior credentials, I decline to accord substantial weight to his opinions. *See.*, Hopton v. U.S. Steel Corp., 7 B.L.R. 1-12, 1-14 (1984); Surma v. Rochester & Pittsburgh Coal Company, 6 B.L.R. 1-799, 1-802 (1984).

In summary, I find that the medical opinion evidence does not establish the existence of pneumoconiosis pursuant to § 718.202(a)(4). Considering of all of the evidence together, I find that it does not substantially establish that Claimant has pneumoconiosis. The x-ray evidence is in equipoise, and there is no other objective evidence to demonstrate the existence of the disease.

C. Reconsideration of the Pulmonary Function Studies

A claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. 20 C.F. R. § 718.204(c)(1)-(4).

In order to establish total disability through pulmonary function tests, the FEV1 must be equal to or less than the values listed in Table B1 of Appendix B to this part and, in addition, the tests must also reveal either (1) values equal to or less than those listed in table B3 for the FVC test, or (2) values equal to or less than those listed in table B5 for the MVV test or (3) a percentage of 55 or less when the results of the FEV1 test are divided by the results of the FVC tests. § 718.204(c)(1)(i)-(iii). Below is a summary of the Pulmonary Function Studies submitted in this case.

Date	EX No.	Physician	Age Height	FEV1	MVV	FVC	FEV1/ FVC	Effort	Qualifies
9/18/79	DX-1	Evans	43 71"[5]	1.50	84.7	4.17	36%	Good	Yes
2/25/80	DX-1	Scott	44 71 ½	3.60 3.66*	153.4 170*	4.86 4.79*	74% 76%	Good Good	No No*
3/6/91	DX-1	Corazza	55 71 ¼"	2.959	116	3.918	75%	Good	No
9/10/91	DX-1	Dittman	55 71"	2.90 2.96*	138 129*	4.04 4.01*	71% 74%	Excellent Excellent	No No*
10/23/01	DX11	Talati	66 71"	2.29 2.47*	96.33 104*	3.57 4.00*	64% 61%	Good Good	No No*
3/19/02	EX-1	Dittman	66 70"	2.02 2.33*	91 101*	3.08 3.22*	65% 72%	- - - - - -	No No*
9/17/02	CX-7	Kraynak	67 71"	1.82	72.13	2.86	64%	Good	Yes
10/16/02	CX-32	Kruk	67 71"	1.33	71.7	2.65	50%	Good	Yes

1. The October 23, 2001 Pulmonary Function Study

In my D & O, I found that the October 23, 2001 test administered by Dr. Dinesh Talati was valid and non-qualifying. D&O at 13. Dr. Kraynak, who reviewed the test on behalf of Claimant, criticized the results of the test because the machine was not calibrated on the day of the test. Additionally, Dr. Kraynak alleged that there were no flow volume loops present with the test. In my D&O, I noted that DX 11 contained one flow volume loop.

Appendix B of the regulations provides that "[a] calibration check shall be performed on the instrument each day before use . . . " App. B (2)(iv). Also, the Regulations require three flow-volume loops. §718.103(b). The Regulations further provide that:

> "no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part."

§ 718.103(c). §718.101(b) requires that "[a]ny clinical test or examination subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered."

The Pulmonary Function report prepared for the October 23, 2001 test indicated that the machine was calibrated on October 17, 2001. DX. 11. Additionally, the report contains only one (1) flow-volume loop. After reviewing the results of the October 23, 2001 pulmonary function test, I find that this test was not in substantial compliance with the quality standards set

[5] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. Protopappas v. Director, OWCP, 6 BLR 1-221 (1983). In this case, Claimant's height was recorded as 71″ five of the eight times he underwent pulmonary function studies. On two other occasions, it was recorded as 71 ¼″. I chose to accept the figure that was most often reported. Consequently, I consider Claimant's height to be 71 inches.

out in the Regulations. Therefore, I find that this test is not entitled to be given any weight in my consideration of whether Claimant was totally disabled as a result of pneumoconiosis.

2. The March 19, 2002 Pulmonary Function Study

In my original D&O, I found that the March 19, 2002 study was valid and non-qualifying. D&O at 13. In his deposition testimony, Dr. Kraynak objected to this test and pointed out that the machine was not calibrated until eight (8) days after the test was administered. The report prepared for this study indicates that the calibration was conducted on March 27, 2002. EX. 1. As stated above, the Regulations require a calibration check each day before the machine is used. App. B (2)(iv). The regulations further require a statement signed by the physician conducting the test that sets forth "Claimant's ability to understand the instructions, ability to follow directions and degree of cooperation in performing the tests." § 718.103(b)(5). In reviewing the report of the March 19, 2002 Pulmonary Function Study, I note that the report does not contain a statement regarding Claimant's cooperation or comprehension during the test.

I cannot determine whether the flow-loop volume is incomplete or whether the tracings indicate that breaks were taken. However, I find that the March 19, 2002 Pulmonary Function Study is not in substantial compliance with the quality standards set out in the Regulations. I base my finding on the fact that there is no indication on the study report that the machine was calibrated on the day of the test.[6] Further, the report does not contain any information regarding Claimant's comprehension and cooperation during the course of the study. As a result, I find that the March 19, 2002 Pulmonary Function Study is not entitled to any weight in deciding whether Claimant was totally disabled as a result of pneumoconiosis.

3. The Remaining Pulmonary Function Studies

In my original D&O, I found that Dr. Kraynak's opinion that Claimant exhibited excellent effort and cooperation during the September 17, 2002 test was entitled to more weight than Dr. Kaplan's opinion that the study was invalid due to inconsistent effort, since Dr. Kraynak personally administered the test and observed Claimant during the test. D&O at 13. My finding was affirmed by the Board. Board D&O at 8. Therefore, I find the September 17, 2002 Pulmonary Function Study was valid and qualifying.

A Pulmonary Function Study on October 16, 2002 produced qualifying results. However, Dr. Kaplan invalidated this test for inconsistent and sub maximal effort. Dr. Kruk opined that Claimant's effort on the test was good. However, I noted that Dr. Kruk did not personally administer the October 16, 2002 test. Rather, the test was administered by Dr. Kraynak. I found that Dr. Kaplan had superior qualifications and that his opinion was entitled to

[6] Regarding the March 27, 2002 calibration date listed on the test, Employer stated in the Proposed Decision and Order on Remand it submitted, "this was clearly an error by the technician . . . ." *see* page 13. However, Employer has not submitted any further evidence to establish that it was in fact an error and that the machine was in fact calibrated on the date of the test. Since the only evidence on the issue is the report itself, I find that the evidence of the March 19, 2002 Pulmonary Function Study is insufficient to reach a conclusion that it was calibrated on the day of the exam as required by the Regulations.

more weight than Dr. Kruk's. As a result, I found the October 16, 2002 test to be invalid. D&O at 14. My finding was affirmed by the Board. Board D&O at 8.

Originally, I found that the 1979 Pulmonary Function Study administered by Dr. Evans, which produced qualifying values was not highly probative because of the remoteness of the test and the fact that subsequent tests produced much higher results. D&O at 12. The tests administered in 1980 and 1991 did not produce qualifying results. More weight may be accorded to the results of recent ventilatory studies over those of earlier studies. Coleman v. Ramey Coal Co., 18 BLR 1-9 (1993). Of the four most recent pulmonary function studies of record, I find that the test administered on September 17, 2002 by Dr. Kraynak, which produced qualifying results is the only valid test. Therefore, I find that Claimant has established total disability by a preponderance of the evidence, through the pulmonary function study evidence under the provisions of § 718.204(b)(2)(i).

The Director has stated that I should reopen the record to allow Dr. Talati to submit additional information in an attempt to remedy the defects in the October 23, 2001 Pulmonary Functions Study. The Board noted in it's Decision and Order that I have discretion to determine whether the record will be opened for the submission of additional evidence. Board D&O at 9. I note that Dr. Kraynak administered his Pulmonary Function Study almost a full year after Dr. Talati's study was performed. Therefore, I would be entitled to give more weight to Dr. Kraynak's study. As a result, I determine that I will not reopen the record for the submission of additional evidence regarding the October 23, 2001 Pulmonary Function Study.

D. Reconsideration of the Medical Opinion Evidence Regarding Total Disability

In my original D&O, I determined that Dr. Dittman's opinion regarding total disability was entitled to the most weight. D&O at 16. I based my initial decision in part on Dr. Dittman's pulmonary function study, which produced non-qualifying results. As stated above, I now find that the Pulmonary Function Test administered by Dr. Dittman on March 19, 2002 was invalid because it was not in substantial compliance with the quality standards set out in the Regulations. I have been instructed by the Board to reconsider my findings based on § 718.204(b)(2)(iv) in light of my reconsideration of the Pulmonary Function Study evidence.

Dr. Dittman opined that Claimant was not totally disabled as a result of pneumoconiosis. He based his opinion on a review of the diagnostic tests he administered and stated that the results of those tests were against "any degree of pneumoconiosis which would be disabling." EX. 11 at 21. However, I note that Dr. Dittman did not review the pulmonary function study performed by Dr. Kraynak, which I found to be valid and qualifying. Also, Dr. Dittman referred to only one chest x-ray taken of Claimant, which was the x-ray performed in conjunction with his examination. In reaching his conclusion, Dr. Dittman did not indicate that he fully considered Claimant's medical records.

Dr. Dittman testified that Claimant reported a seven to nine year breathing problem. EX. 11 at 7. Dr. Dittman also testified that Claimant was using two types of inhalers as well as taking oxygen. EX. 11 at 9. During his physical examination of Claimant, Dr. Dittman noted

abnormal findings in Claimant's lungs. EX. 11 at 22. Although Dr. Dittman opined that Claimant suffers from an obstructive lung disease, he did provide any information regarding his opinion of Claimant's respiratory impairment.

Dr. Dittman testified that Claimant had a 20 year coal mine employment history. However, he did not ask Claimant about the physical requirements of his last job in the coal industry. I am required to compare the exertional requirements of Claimant's usual coal mine work with a physician's assessment of the Claimant's respiratory impairment. Schetroma v. Director, OWCP, 18 B.L.R. 1-19. 1-24 (1993). Dr. Dittman expressed the opinion that Claimant is not disabled; however he did not determine Claimant's exertional requirements to determine if Claimant's lung disease would prevent him from returning to his regular work in the coal industry.

I find that the opinion of Dr. Kraynak that Claimant is totally disabled is more reasoned and therefore entitled to more weight. First, as noted above, of the four most recent pulmonary function tests, the test administered by Dr. Kraynak, which produced qualifying results, was the only valid test. Next, Dr. Kraynak reviewed other medical evidence of record, which enabled him to obtain a thorough picture of Claimant's health. Further, Dr. Kraynak testified that he was familiar with the physical requirements of Claimant's last position in the coal industry. Dr. Kraynak testified that Claimant's last position entailed "heavy work" and that Claimant was expected "to lift tools as well as material in excess of 100 pounds frequently throughout the course of his workday." CX 24 at 7.

Dr. Kraynak testified that Claimant reported to him that he had difficulty walking a block or up a flight of stairs without shortness of breath. CX. 24 at 7. Claimant reported the same complaints to Dr. Dittman. EX. 11 at 7. Additionally, Dr. Dittman testified that Claimant would become dyspenic if he bent over to pick up a bucket of coal. EX. 11 at 8. Based on Dr. Kraynak's testimony, I am able to compare the exertional requirements of Claimant's last work in the coal industry to the physician's assessment of his respiratory impairment. I find that based on the evidence, Claimant is totally disabled. I base my finding on the evidence that has been presented that Claimant suffers shortness of breath when walking a block or up stairs. Additionally, I have considered Claimant's use of oxygen and inhalers. Claimant's report that he becomes dyspenic bending over to pick up a bucket of coal leads me to conclude that he would not be able to lift the heavy tools and materials his coal mine work would require.

I find that the medical opinion evidence establishes that Claimant is disabled from a pulmonary impairment. I further find that considering all of the evidence together, Claimant's disability has been demonstrated.

E. Total Disability Due to Pneumoconiosis

Claimant bears the burden of proving pneumoconiosis is a substantial contributor to a miner's total respiratory disability. 20 C.F.R. § 717.204 (c)(1). Sections 718.204(c)(1)(i) and (ii) provide that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c)(1)(i)-(ii). Disability due to pneumoconiosis may be established by a documented and reasoned medical report. § 718.204(c)(2).

In my D&O, I noted that three physicians, Dr. Kraynak, Dr. Kruk and Dr. Talati, diagnosed Claimant with pneumoconiosis. However, I discounted the opinions of Dr. Kruk and Dr. Talati because they did not have an accurate smoking history. D&O at 10. In addition, Dr. Kraynak's opinion is not entitled to great weight, because it rests in part upon x-ray evidence that I have found to be not dispositive. In addition, the doctor's opinion is not well-reasoned, particularly considering Claimant's smoking history, which I find Dr. Kraynak did not fully address. I find that the evidence fails to establish that Claimant is totally disabled due to pneumoconiosis.

F. Pneumoconiosis Arising Out of Coal Mine Employment

Assuming that Claimant had established the presence of pneumoconiosis, because he has established more than 10 years of coal mine work, he would be entitled to the rebuttable presumption that his pneumoconiosis arose out of such employment. § 718.203 (b). However, because I have found that Claimant has established the presence of pneumoconiosis, I cannot find that it arose out of his coal mine employment.

CONCLUSION

Claimant has not established that he has pneumoconiosis arising from his coal mine employment. Claimant has established that he has a total respiratory disability, but has not demonstrated that the total respiratory disability arose from pneumoconiosis. Therefore, Claimant has not proven the requisite elements for entitlement to benefits under the Act.

ATTORNEY FEE

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.

ORDER

The claim of MICHAEL LOUIS. BELLITS for benefits under the Act is DENIED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of the Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.